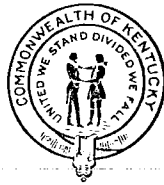


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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 6, 1977

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC  
Decision +  
Order No. 477*

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

HERBERT L. STOWERS  
MEMBER

KOSHRC #325

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

NATIONAL BRUSH COMPANY

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STOWERS and UPTON, Commissioners.

STOWERS, Commissioner:

A Recommended Order of Hearing Officer Herbert B. Sparks, issued under date of June 21, 1977, is before this Commission for consideration pursuant to an Order of Direction for Review.

Finding no error in the application of the law to the facts herein, and the evidence appearing to adequately support the findings and conclusions of the Hearing Officer, it is the ORDER of the Review Commission that the Recommended Order of the Hearing Officer be and it is hereby AFFIRMED, and the citation involved is VACATED.

*H. L. Stowers*  
\_\_\_\_\_  
H. L. Stowers, Commissioner

Concurring: /s/ Charles B. Upton  
\_\_\_\_\_  
Charles B. Upton, Commissioner

Dated: October 6, 1977  
Frankfort, Kentucky  
DECISION NO. 477

This is to certify that copy of this Decision has been served by mailing or personal delivery on the following:


Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Frederick G. Huggins  
Deputy General Counsel

Honorable Peter K. Wilson, Jr., (Certified Mail #240719)  
Attorney at Law  
220 East Galena Blvd.  
Aurora, Illinois 60507

National Brush Company (First Class Mail)  
Plant No. 4  
P. O. Box 484  
Glasgow, Kentucky 42141

This 6th day of October, 1977.

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON  
CHAIRMAN

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

104 BRIDGE ST.

HERBERT L. STOWERS  
MEMBER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

CHARLES B. UPTON  
MEMBER

June 21, 1977

*KOSHRC  
Decision +  
Order No. 432*

KOSHRC # 325

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

NATIONAL BRUSH COMPANY

RESPONDENT

NOTICE OF RECEIPT OF  
RECOMMENDED ORDER, AND  
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:

Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Kenneth E. Hollis, General Counsel (Messenger Service)  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Frederick G. Huggins  
Assistant Counsel

Hon. Peter K. Wilson, Jr., (Certified Mail #114283)  
PUCKETT, BARNETT, LARSON, MICKEY,  
WILSON, OCHSENSHLAGER  
220 East Galena Boulevard  
Aurora, Illinois 60507

National Brush Company (First Class Mail)  
Plant No. 4  
P. O. Box 484  
Glasgow, Kentucky 42141

This 21st day of June, 1977,

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC # 325

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS. DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
RECOMMENDED ORDER

NATIONAL BRUSH COMPANY

RESPONDENT

\* \* \*

Hon. Frederick Huggins, Assistant Counsel, Department of Labor,  
Frankfort, Kentucky, for Complainant

Hon. Peter K. Wilson and John Duggan, Puckett, Barnett, Larson,  
Mickey, Wilson & Ochsenschlager, 220 East Galena Boulevard,  
Aurora, Illinois, Attorneys for Respondent, National Brush  
Company

\*\*\*\*\*

An inspection was made on August 18, 1976, by the Kentucky Department of Labor, Division of Occupational Safety and Health, at a place of employment located in Barren County, Kentucky, at or near 807 West Grandview Avenue, Glasgow, Kentucky, where the Respondent was engaged in the operation of a saw mill. On the basis of the inspection it was alleged in the citation dated September 27, 1976, that the Respondent had violated the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972) with three other than serious violations.

The standard that is in issue here is an alleged violation of 29 CFR 1910.95(b)(1) as adopted by 803 KAR 2.020 in that the saw attendants (two in the main saw mill), were subjected to sound levels exceeding those listed in Table G-16 of this standard without feasible administrative or engineering controls being utilized.

The pertinent information and dates are as follows:

1. Inspection of the premises mentioned above was August 18, 1976.
2. Citation issued September 27, 1976.
3. There was no proposed penalty and this was alleged to be an other than serious violation.
4. The Notice of Contest was received October 8, 1976, contesting the above-named item.
5. The Notice of Receipt of Contest was sent out October 13, 1976.
6. Certification of Employer Form was received October 20, 1976.
7. The Complaint was received October 22, 1976. Answer was filed November 1, 1976.
8. The hearing was originally scheduled for November 8, 1976, and was held after some postponements on February 28, 1977.

The aforesaid hearing was held under the provisions of KRS 338.071(4), one of the provisions dealing with the safety and health of employees which authorized the Review Commission to hear and rule on appeals from citations, notifications and variances issued under the provisions of this chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearing. Under

the provisions of KRS 338.081, the hearing was authorized under the provisions of said chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing and appeal, the Review Commission may sustain, modify or dismiss the citation or penalty.

After hearing the testimony of the witnesses, having considered same, together with exhibits filed and stipulations and representations of the parties, it is concluded that the substantial evidence on the record considered as a whole supports the following Findings of Fact.

#### DISCUSSION OF THE CASE AND FINDINGS OF FACT

Jurisdiction of the parties in the subject matter and due and timely notice of the hearing is found by the Hearing Officer.

The saw mill involved was a saw mill of Respondent National Brush Company located in Glasgow, Kentucky, and which employed approximately twelve (12) people in production and a total of sixteen (16) to eighteen (18) people all together.

The saw mill portion is located in a building approximately twenty eight (28) feet by eighty one (81) feet and contains three (3) people, a head saw operator who is enclosed in a booth and two edging saw operators.

There seems to be little dispute that during the inspection the noise levels affecting the two edging saw operators were detected and these noise levels exceeded the levels in Table G-16 of 29 CFR 1910.95.

The testimony indicated that the area concerned where the two saw attendants were was in the main saw mill, and they were being subjected to these sound levels in quantities, which a dosimeter indicated as to a Mr. Meskit was 239% of the percentage allowable and as to Mr. Pitcock 303% of percentage allowable (Transcript p. 18). The construction of the saw mill was basically corrugated metal with concrete floor and some wooden floors with a corrugated roof (Transcript p. 28). It was acknowledged that the head saw operator was in a booth and operated his saw by remote control (Transcript p. 35).

There were also indications that the employees were wearing personal ear protection on the day of the inspection (Transcript p. 37).

At the conclusion of Complainant's proof the Respondent moved to dismiss on the basis that the Complainant must prove not only a violation but that there are feasible controls for abating the standard allegedly violated and relied on the Continental Can case and gave a docket number at the time. This Continental Can case has since the date of the hearing been published, and is found at 1976-1977 OSHD Paragraph 21, 009 Continental Can Company, Inc.

It further appears that the Respondent has instituted certain controls in the form of a booth already alluded to and also has constructed an enclosure for an edging saw, the same being implemented after a federal inspection. A booth cannot be constructed for the edging saw operators because of the nature of their job.



Further, the Respondent through the testimony of its various witnesses, indicated that the technical possibility of finding additional engineering controls could exist in the form of new tooling, new equipment, and the installation of shielding, on the condition that new tool designs are effective or that the Respondent erect a new or extended building. The Respondent argues that these contingencies render technical possibilities so questionable as to make them impossible for practical purposes.

Also using the Respondent's figures the minimum cost estimates for these proposals range from \$33,000.00 to approximately \$40,000.00 and do not include the cost of new tool design research and do not include the cost of a new or extended plant facility. These were introduced as Exhibits or proposals from an expert witness called by the Respondent, the expert being Dr. John S. Stewart, who is the current director of Noise Control Services, Inc., Greensboro, North Carolina, and who is also an adjunct assistant professor with the Department of Mechanical and Aerospace Engineering of North Carolina State University, Raleigh, North Carolina.

The testimony also revealed that Respondent's plant site is such that an extension of the plant facilities as suggested is impossible because of a 40-foot dropoff.

Further, through the testimony of other witnesses the Respondent introduced evidence of personal ear protective devices being available which will reduce the noise level well below 90 dBa,

and, coupled with a hearing testing program, will effectively protect the two affected employees from hearing loss due to exposure to the existing noise levels. The ear plugs will attenuate the noise levels by up to 44 dBa and ear muffs will attenuate by up to 48 dBa.

The cost of the personal protective devices and testing maintenance program will be approximately \$1,000.00 on the first year and \$200.00 to \$300.00 in later years (Transcript p. 117).

In light of the foregoing the following Conclusions of Law would seem appropriate.

#### CONCLUSIONS OF LAW

There have recently been decided several cases which your Hearing Officer has examined in arriving at a decision in this case. Of note particularly is the Continental Can case already referred to, 1976-1977 OSHD, Paragraph 21, 009 Continental Can Company, Inc., wherein citations for violations of 1910.95(b)(1), failure to implement feasible engineering noise controls were vacated, because the Secretary failed to establish that such controls were economically feasible. The employer in that case converted sheet metal into finished cans and at most locations in the production areas noise levels exceeded 90 dBa. Since employees work eight hour or longer shifts, the noise levels in Table G-16 were exceeded. The employer argued that engineering controls need be implemented only if it is determined that such controls would bring the noise level within permissible limits.

It was also argued that in determining whether controls were feasible, the costs of such controls must be considered and weighed against the benefits which will be produced. Commissioners Barnako and Cleary (in his dissenting opinion) agreed that the standard requires the implementation of feasible engineering and administrative controls even though such measures by themselves may not bring sound levels within the limits set out in Table G-16. Commissioners Barnako and Moran were in agreement that "feasible" means economic as well as technical feasibility and that the burden of establishing the economic and technical feasibility is on the Secretary. The employer stated that installation of the engineering controls on 6300 machines in his 79 plants would cost approximately \$33,000,000.00 with annual maintenance cost of about \$175,000.00 compared to the \$100,000.00 annual cost of its current hearing conservation program utilizing personal protective equipment.

Your Hearing Officer has also examined 1976-1977 OSHD Paragraph 21, 259 Ford Motor Company, wherein a citation alleging repeated nonserious violations of 1910.95(b)(1), failure to implement feasible administrative or engineering controls to reduce excessive noise detected in the press department of an automobile plant, was vacated because the Secretary failed to identify the specific sources of excessive noise and showed that feasible administrative or engineering controls existed.

Further, the case of 1976-1977 OSHD Paragraph 21, 476

Peterson Manufacturing Company, Inc. held that a hand tool manufacturer was not in violation of 1910.95 for failure to reduce the noise level in its plant to the level required by the standard because the Secretary failed to establish economic feasibility. The evidence of audiodosimeters showed that at least three employees were being subjected to noise in excess of that permitted, but the investigator indicated he did not know the cost of instituting noise controls and their effectiveness. The employer made good-faith efforts to reduce noise levels and to protect his employees and the Secretary failed to prove that noise reduction in the plant was feasible. The Continental Can Company case was cited and the holding was that there must be a feasible and reasonable economical method of reducing noise before a violation can be found.

Further, there has recently been handed down Great Falls Tribune Company and Castle & Cooke Foods wherein engineering controls for excessive noise were found to be technologically feasible, but the cost necessary for their implementation and maintenance were found to be too high to be justified by the benefits which would have been derived and the noise violation citations were vacated.

In Great Falls eight employees were exposed to noise in the newspaper press room of 100 dBa, but the hazard was reduced by ear muffs which if used effectively reduced noise by at least 20 dBa. The Commissioners found that technologically feasible

engineering controls could reduce the ambient noise levels to about 93.5 dBa at a cost of about \$12,500.00 per employee. But workers would still be required to wear ear muffs because the permissible limits would not be achieved. The Commission ruled that these costs were excessive in view of the relatively slight benefits which would be derived.

In Castle & Cooke, some 122 employees in a can manufacturing plant were exposed to noise levels of about 100 dBa; these employees also wore ear muffs. Technologically feasible controls could reduce the ambient noise levels to within the permissible limits at an initial cost of \$3,100.00 per employee, and annual costs for loss of production and maintenance of \$1,100.00 per employee. The Commissioners held that the benefits to be gained would not justify the cost of controls.

When confronted with the federal precedent, your Hearing Officer is persuaded by the argument of Respondent herein. In its brief, the Complainant states that while a long line of federal authorities requires that in order to prove a noise violation, abatement must be technically and economically feasible, it is the position of the Commissioner that such proof is not required under Kentucky law. He further argues that there was sufficient proof of a violation of the regulation. If, however, the Review Commission rules that federal law is applicable, the Complainant argues that technical and economic compliance is feasible. Then the Complainant seeks to do so with a series of economic arguments.

Your Hearing Officer is not so persuaded. In Respondent's plant there are two affected employees. The evidence showed that they wore personal protective devices. The evidence also showed that a slightly more comprehensive program of personal protective devices and testing would adequately protect their hearing and prevent hearing loss due to exposure to harmful noise levels. The initial start-up cost of this program will be around \$1,000.00 or \$500.00 with an annual maintenance cost in the area of \$100.00 to \$200.00 per employee.

On the other hand, only partial estimates could be obtained for Dr. Stewart's suggestions because there was no way to obtain estimates on tooling design work and building construction when no site was available. Even the partial estimates, however, were large. For the only proposal which Dr. Stewart believed to be likely of success, the estimated costs were \$40,000.00 without the building construction. That works out to \$20,000.00 per affected employee which is totally unjustifiable. There is no guarantee it would work and Respondent could likely have to provide the personal protective devices and the testing program described by its expert in any event.

In light of all the above it would seem that the correct holding in this case would be a vacation of the alleged violation.

The Hearing Officer is impressed with the conscientious desire of the Respondent and its concern about its employees' hearing, and has severe reservations about causing the Respondent

to expend over \$40,000.00 to remedy the situation for two employees.

Based upon the foregoing authorities and based upon the foregoing Conclusions of Law the following Recommended Order would seem appropriate.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the alleged violation of 29 CFR 1910.95(b)(1) (as adopted by 803 KAR 2:020) shall be, and the same is hereby, vacated.

  
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HERBERT B. SPARKS  
HEARING OFFICER - KOSHRC

Dated June 21, 1977.  
Frankfort, Kentucky  
Decision No. 432